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In Search of Accountability: A Critical (If Preliminary) Assessment of the Literature on Canadian-Nigerian Engagements on the Immunities of State Officials for Human Rights Violations

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IN SEARCH OF ACCOUNTABILITY: A CRITICAL (IF PRELIMINARY) ASSESSMENT OF THE LITERATURE ON CANADIAN-NIGERIAN ENGAGEMENTS ON THE IMMUNITIES OF STATE OFFICIALS FOR HUMAN RIGHTS VIOLATIONS

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The trials of German and Japanese state officials following the end of World War II at the International Military Tribunals in Nuremberg and Tokyo along with treaty obligations undertaken by states since at least the establishment of the United Nations, have together given rise to the question of whether states and their officials are entitled to immunity for violations of human rights. This question was highlighted by the case against Pinochet Ugarte of Chile, which came more recently before the United Kingdom House of Lords. The case propelled the immunity of state officials into the limelight of judicial and academic discourse and resulted in increased human rights advocacy for accountability against senior state officials. Since the 1990s, the practice of the United Nations Security Council of establishing ad hoc international criminal tribunals under their peace and security mandate, and the referral to the International Criminal Court and/or its preliminary investigation of later cases arising from conflicts in places like Darfur, Libya, and North Eastern Nigeria, sustain the impetus for this article.

1. THIS ARTICLE IS A PRELIMINARY PART of a much wider study examining Canadian human rights engagements in Anglophone Africa. This article focuses on Nigeria for strategic reasons, including the fact that Nigeria constitutes Africa's most populous state and the fact that Nigeria plays a prominent role in driving and shaping human rights discourse and praxis in Africa, particularly on the issue of the accountability of state officials for human rights violations. To this end, the article will assess the nature of Canada's engagements with Nigeria as they relate to the question of the immunity of state officials for violations of human rights. This assessment will be conducted with a specific view to ascertaining the problems, prospects, and goals of these engagements.

It is pertinent, however, to address some introductory points and enter some caveats. First, immunity is not a freestanding principle of international law. The concept of immunity should be seen generally as an exception to the jurisdictional competence (*i.e.* both

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adjudicatory and enforcement) of a body. Thus, it is inherent in its nature that immunity is a procedural bar and does not imply an absence of substantive legal liability. Rather, it constitutes merely an absence of jurisdiction, the point being that adjudication or enforcement is circumscribed by rules on immunity.¹ Secondly, at the core of the international system is the principle of sovereignty, such that no state can claim legal superiority over another. Thirdly, a distinction is made as to the sovereign immunity entitlements of states – the distinction is composed of three separate genres vis-à-vis state immunity, diplomatic immunity, and “state official” immunity. The first two genres are governed in international law by both customary international law and treaty law, whereas state official immunity is governed exclusively by customary international law. Fourth, international law adopts a bifurcated approach to the immunity of state officials by recognizing absolute immunity *ratione personae* for serving officials and a limited immunity *ratione materiae* for former officials. A further distinction is made between criminal and civil responsibility for the purposes of accountability because the institution of a civil case against state officials impleads the state itself. For this reason, the decisions of the Canadian courts in *Bouzari v Islamic Republic of Iran*² and *Kazemi Estate v Islamic Republic of Iran*,³ which both involve civil responsibility, will not form part of this article. Finally, the analysis in this article is limited to human rights issues as they concern torture, war crimes, crimes against humanity, genocide, and aggression. Other human rights are beyond the scope of this article.

The notion of the immunity of states and their officials originated in classical positivist international law, at a time when states were recognized as the only subjects of international law, and the direct protection of the individual had not yet come within the optic

¹*Dickinson v Del Solar Mobile and General Insurance Co Ltd (Third Party)*, [1930] 1 KB 376 (King’s Bench Div UK) Lord Hewart CJ. See also *Case Concerning Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)*, Judgment of 14 February 2002, [2002] ICJ Rep 3 at 60 [Arrest Warrant]; Yoram Dinstein, “Diplomatic Immunity from Jurisdiction *Ratione Materiae*” (1966) 15:1 ICLQ 76 at 81.

² [2002] OTC 297, 114 ACWS (3d) 57 (Ont Sup Ct), aff’d (2004), 71 OR (3d) 675, 243 DLR (4th) 406 (CA).

³ 2014 SCC 62, [2014] 3 SCR 176.

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of international law. Traditionally, states were the protectors and enforcers of the individual rights of citizens and so could espouse international claims on behalf of their citizenry. With the development of human rights, the evolution of international law has witnessed an individual-oriented approach as against the traditional state-oriented approach. This naturalist progressive view of international law articulates that there can be no immunity for violations of human rights. While the essence of immunity is the exemption of the adjudicatory and enforcement jurisdiction of states, human rights expanded the adjudicatory jurisdiction of states thereby resulting in what seems to be a doctrinal conflict between the two systems.

The question of the immunity of state officials remains an important, controversial, and contemporary concern. This question raises sub-issues ranging from the rationale for a system of immunities, what type of state officials would benefit from immunities, what is nature of such immunity, and whether there is a conflict between immunities and human rights, to whether there can be immunity for state officials for human rights violations. The focus of the article is on the last two issues and Canada's engagements with Nigeria in those regards. To this end the article is divided into six parts. This introduction gives a background to the article by highlighting the anxieties in the discourses on the question of the immunities of state officials for human rights violations. By showing how the immunities of state officials is a human rights issue, Part II sets out the problem concerning the interface between a system of immunities and a system of human rights. Part III provides an assessment of some of the literature surrounding whether there can be immunity for human rights. This article, in rationalizing a system of human rights with a system of immunities argues mainly that a two-pronged approach whereby a distinction is made between immunity cases that appear before the courts of foreign states and those cases that appear before international courts is critical to any assessment.

Part IV moves on to offer a preliminary assessment of Canadian-Nigerian human rights engagements (or the lack thereof) in regard to the International Criminal Court (ICC) regime and Nigerian involvement in both the trial of Charles Taylor by the Special Court for Sierra Leone and the establishment of the Extraordinary African Chambers in the Courts of Senegal. In Part V, the article examines and teases out the nature, attainments, problems, and prospects of this engagement, while Part VI concludes the article and sets out a research agenda for the near future.

II. THE PROBLEM SO FAR

Generally, international human rights instruments are applicable to states and seek to ensure that state officials and agents respect the stipulated standards.⁴ However, human rights encounter an enforcement crisis where immunities are involved.⁵ This arises because, while human rights enhance the jurisdiction of states, immunities are an exemption from the jurisdiction that a state may ordinarily possess. Thus, by the exemption of a state or its official from the jurisdiction of a court, immunity has the consequence of posing a challenge to the enforcement of human rights standards. As such, immunity is widely perceived as inhibiting the development of a system of human rights that is otherwise capable of meeting international standards of accountability.⁶

At the heart of this discourse are two *seemingly* conflicting perspectives. First, the classical positivist view recognizes that states are the only subjects of international law and that the duties and rights enunciated in human rights instruments devolve on states. As such, international rules are to be interpreted against the backdrop of the position of the individual

⁴ Ilias Bantekas & Susan Nash, *International Criminal Law*, 2nd ed (London: Cavendish Publishing, 2003) at 14.

⁵ M Cherif Bassiouni, "The Proscribing Function of International Criminal Law in the Processes of International Protection of Human Rights" (1982) 9:193 Yale J World Pub Order 193.

⁶ *Campione v Peti-Nitrogenmuvek NV and Hungarian Republic*, (1972) 65 ILR 287 at 302 (Italy).

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who is incapable of acquiring direct rights in international law.⁷ Based on this classical view of international law, the immunities of states and state officials are always to be respected.

Second, the naturalist, progressive, human rights perspective of international law argues that no immutable rule stipulates that only states can acquire direct rights and duties in international law. As such, nothing prevents individuals and organizations from assuming direct rights in international law, especially in view of the trend towards recognizing the increasing importance of non-state actors in international activities.⁸ With the emerging trend in international law seeking to entrench a culture of accountability, it has been argued that the enforcement of individual human rights should prevail even where immunities are involved.⁹

It has been argued that the increasing significance and recognition of the individual in international law largely contributed to the recent legal developments regarding the immunities of states (*i.e.* the move from absolute to restrictive immunity), though it may have only been with respect to the economic interests of individuals or at least of “the international business [hu]man”.¹⁰ It would seem that it follows that the civil interests of individuals should also be given the same value as their economic interests, which would translate into a more progressive restriction of the immunities of states. The argument here is that states, after all, exist for its citizenry and the duty of states include the protection of individuals and safeguarding their fundamental freedoms.

Like the concept of immunities, the existence of a system of human rights is founded upon the sovereignty of states. Sovereignty may be seen as a matter of competence whereby it is purely an articulation of “the way that political power is or should be exercised”.¹¹ This

⁷Jürgen Bröhmer, *State Immunity and the Violation of Human Rights* (The Hague: Martinus Nijhoff Publishers, 1997) at 8.

⁸Hersch Lauterpacht, *International Law and Human Rights* (London: Stevens and Sons, 1950) at 4.

⁹Hersch Lauterpacht, “The Problem of Jurisdictional Immunities of Foreign States” (1951) 28 Brit YB Intl L 220 at 235.

¹⁰Bröhmer, *supra* note 7 at 143.

¹¹ Joseph A Camilleri, “Rethinking Sovereignty in a Shrinking, Fragmented World” in RBJ Walker & Saul H Mendlovitz, *Contending Sovereignities: Redefining Political Community* (Boulder: Lynne Rienner, 1990) 13.

is responsible for the tendency in expressing the powers of the state as absolute and is evident in the early notions on sovereignty which is foundational to the concept of immunities.¹² As such, sovereignty defines the powers of a state to pursue and effect its ideals through its own authorities and under its own laws, as well as the exclusive control of a state over affairs within its territory.¹³ From the perspective of international law, sovereignty involves the legal independence of a state, non-interference in the conduct of its affairs, and the competence to engage in foreign relations including the establishment of a pluralist international system. Such a pluralist system would be founded upon the sovereignties of the constituent states – the establishment of the system being, in itself, an expression of sovereignty.

In a pluralist system, the concept of sovereignty would on the one hand underlie the nature of the relationship between states *inter se*, and on the other hand, the relationship between states and the system, itself.¹⁴ Likewise, the competence of international institutions would be defined by sovereignty as the basis for applying international norms.¹⁵ Thus, sovereignty is the impetus for articulating human rights under the International Bill of Rights as one of the foundational instruments for a system of human rights in international law. It becomes apposite to consider whether there is an actual conflict between the imperatives of a system of human rights and a system of immunities.

¹² The French Jurist, Jean Bodin, in his theory of the state first sought to justify the ultimate and plenary nature of the power of the King based on the concept of sovereignty in his classical work, “Six Livres de la République” (The Six Books of the Republic) cited in Djura Ninčić, *The Problem of Sovereignty in the Charter and in the Practice of the United Nations*, (The Hague: Martinus Nijhoff, 1970) 3. See also FH Hinsley, *Sovereignty*, 2nd ed (Cambridge: University Press, 1986) 1.

¹³ This reasoning is also evident in the definition of a sovereign state by M De Vattel, *The Law of Nations; or Principles of the Law of Nature Applied to the Conduct and Affairs of Sovereigns*, (Translated from French) (Dublin: Luke White, 1792) 66 (“every nation that governs itself, under what form so ever, without dependence on any foreign power, is a sovereign state. Its rights are naturally the same as those of any other state”).

¹⁴ Bröhmer, *supra* note 7 at 12.

¹⁵ Benedict Kingsbury, ‘Sovereignty and Inequality’, (1998) 9 *EJIL* 601

III. THE IMMUNITY OF STATE OFFICIALS FOR HUMAN RIGHTS VIOLATIONS

The issue of whether there can be immunity for human rights violations has pitted legal scholars against one another. There are few areas of international law in which the polarity is as heated, contentious, and patent.

On the one hand, there is the view that serving state officials enjoy absolute immunity (*i.e. ratione personae*) while former state officials enjoy a limited immunity (*i.e. ratione materiae*) for human rights violations. To proponents of this view, contrary to a popular and contrived opinion, immunity does not mean impunity and, importantly, there is no conflict between immunity and human rights even where the rights in question are *jus cogens* norms. Thus, Hazel Fox argues that immunity is a rule of procedure and not of substantive law; the different nature of the rules is such that immunity cannot contradict a *jus cogens* norm but “merely diverts any breach of it to a different method of settlement.”¹⁶ Roger O’Keefe also lends his voice to this view, contending that a rigorous and dispassionate examination of customary international law does not support an international crime exception to the immunities of state officials.¹⁷

On the other hand, Andrea Bianchi highlights the need for courts to interpret legal rules on immunity in line with the principles and goals of international law (*i.e. lex ferenda*) because international law cannot grant immunity from the acts which it criminalizes.¹⁸ Ramona Pedretti is of the view that foreign state officials cannot escape accountability for crimes against peace or aggression, genocide, war crimes, and crimes against humanity by

¹⁶ Hazel Fox, *The Law of State Immunity* (Oxford: Oxford University Press, 2002) at 525; Hazel Fox, *The Law of State Immunity*, 2nd ed (Oxford: Oxford University Press, 2008) at 151; see *Jones v Saudi Arabia*, [2004] EWCA Civ 1394; aff’d [2005] 2 WLR 808; aff’d [2006] UKHL 26 at paras 24, 44 (UK) Lords Bingham & Hoffman JJ.

¹⁷ Roger O’Keefe, “An ‘International Crime’ Exception to the Immunity of State Officials from Foreign Criminal Jurisdiction: Not Currently, Not Likely” (2015) 109 AJIL Unbound 167 at 167.

¹⁸ Andrea Bianchi, “Immunity versus Human Rights: The Pinochet Case”, (1999) 10:2 Eur J Intl L 237 at 260-61.

relying on immunity.¹⁹ This view is supported by JMT Labuschagne, who has argued that heads of state are politically accountable both to their constituencies and citizens, as well as for human rights atrocities in international law.²⁰ JD Van der Vyver has boldly asserted that state official immunity is rapidly being phased out in international criminal law due to “socio-juridical and philosophical shift from the sovereign state to the constitutional state...”²¹

Ingrid Wuerth and Chimène Keitner, however, each provide intermediary views to the legal scholarship. Wuerth approaches the system of immunities and the system of human rights separately, discussing and highlighting their respective intrinsic and important values. According to Wuerth:

Immunity is an important issue in its own right; justice and accountability for violations of international criminal law are obviously important values. But it is also part of a broader move to reframe sovereignty and international law itself in terms of individuals and human security. Doctrinally, immunity or restrictions on it are one corner of a potential transformation of international law which includes universal jurisdiction, international criminal law, responsibility to protect, and a re-orientation of the work of UN Security Council. Today, however, doctrinal setbacks, the apparent failure of intervention in Libya, difficulties implementing universal jurisdiction, and questionable support from states, all raise questions about whether this broader re-orientation of international law has been or will be fully successful. The values protected by immunity—sovereign equality of states, peaceful coexistence, the avoidance of biased or incorrect judgments by the national courts of foreign states—are of continued, if not growing, importance.²²

Keitner, while arguing that immunity is “necessarily incompatible with combatting impunity,” recognizes the imperative of balancing competing values.²³ Aware that courts of law can only apply the law as it is, Rosanne Van Alebeek argues that such application of the law should take into consideration *lex ferenda* (i.e. policy arguments) so as to ensure

¹⁹ Ramona Pedretti, *Immunity of Heads of State and State Officials for International Crimes* (The Netherlands: Martinus Nijhoff, 2014) at 119.

²⁰ JMT Labuschagne, “Immunity of the Head of State for Human Rights Violations in International Criminal Law” (2001) 26:1 SAYBIL 180 at 183.

²¹ JD Van der Vyver, “Universal Jurisdiction in International Criminal Law” (1999) 24:1 SAYBIL 107 at 190-91.

²² Ingrid B Wuerth, “Introduction to Symposium on the Immunity of State Officials” (2015) 109 AJIL Unbound 153 at 154.

²³ Chimène I Keitner, “Horizontal Enforcement and the ILC’s Proposed Draft Articles on the Immunity of State Officials from Foreign Criminal Jurisdiction” (2015) 109 AJIL Unbound 161 at 163.

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available remedies for individuals who suffer as a result of violations of human rights norms.²⁴

There is a reticence in existing scholarship to adopt a nuanced approach as well as to consider the unique and complex nature of international rule-making in the analysis of whether there can be immunities in international law for violations of human rights. For instance, John Dugard, in asserting that it is merely a “question of time” before sovereign immunity would give way to human rights which have attained *jus cogens* status,²⁵ makes time, rather than international convention/custom, the determining factor. This article argues that a two-pronged approach is imperative. However, a distinction must first be made between immunity cases that appear before the courts of foreign states and those cases that appear before international courts. Furthermore, an objective assessment of the current state of the law (*i.e. de lege lata*), which takes into consideration the dynamics of international rule making, is needed; this will guide any developments *de lege ferenda*.

On the issue of the immunities of state officials before the courts of foreign states, customary international law supports absolute state immunity *ratione personae* even for human rights violations. Currently, the efforts of the International Law Commission (ILC) are invested in the formulation of principles of immunity from foreign criminal jurisdiction,²⁶ and the Sixth Committee of the United Nations General Assembly is debating the scope and applicability of the principle of universal jurisdiction. These efforts necessarily implicate the views and conduct of states, hence necessitating a study of Canadian-Nigerian human rights engagements in this area.

International courts are created by treaty and, as such, the immunities of state officials before international courts are dependent upon the constitutive instrument establishing the

²⁴ Rosanne Van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* (Oxford: Oxford University Press, 2008).

²⁵ John Dugard, “Immunity, Human Rights and International Crimes” (2005) 2005:3 J South Afr L 482.

²⁶ See Sean D Murphy, “Immunity *Ratione Personae* of Foreign Government Officials and other Topics: The Sixty-Fifth Session of the International Law Commission” (2014) 108:1 AJIL 41.

international court in question and the extent to which this instrument binds the state and implicates the acts of its senior state officials. This observation is shared by Dapo Akande.²⁷

There is a tendency in the literature to assess immunity only from the perspective of international public policy vis-à-vis accountability for human rights violations, *i.e.* immunity vs. impunity. However, a grey area remains in the literature, presented by transitional societies wherein broader ideals of peace and security must be considered in the employment of truth and reconciliation mechanisms. These situations can arise in cases where there have been egregious violations of human rights, such as in the case of South Africa and Rwanda.

IV. CANADIAN/NIGERIAN ENGAGEMENTS (OR THE LACK THEREOF) ON THE IMMUNITIES OF STATE OFFICIALS FOR HUMAN RIGHTS VIOLATIONS

Preliminary findings do not suggest any direct engagement between the two countries in this area. What is evident at best from a review of the literature is that the involvement of both countries, independently of each other, can be seen in the establishment of the ICC and its regime. It is also clear that Nigeria played a role in the Special Court of Sierra Leone (SCSL)'s trial of Charles Taylor by surrendering him to Liberia. It also was involved in the establishment of the Extraordinary African Chambers (EAC) in the Courts of Senegal. Thus, far in my preliminary research, I have not encountered evidence of Canada's joint or separate involvement in these last two cases/events, though this could have occurred.

A. THE ICC REGIME

The absence of an internationally agreed-upon convention on the immunity of state officials makes the practices of Canada and Nigeria especially important in view of the fact that both

²⁷ Dapo Akande, "International Law Immunities and the International Criminal Court" (2004) 98:3 AJIL 407 at 417-18.

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countries, having both signed and ratified it, are state parties to the *Rome Statute*.²⁸ The roles of Canada and Nigeria in the establishment and regime of the ICC, albeit to varying extents, is relevant here due to the fact that the *Rome Statute* does not allow immunity to state officials for human rights violations in cases within the jurisdiction of the Court.²⁹ The centrality of Canada's role in the area of the enforcement of human rights through the machinery of international criminal law is evident from its strong involvement in the establishment of the ICC. Canada's motivation of the international community to adopt the *Rome Statute*, its generation of support for the ICC through public statements and extensive lobbying, its provision of financial assistance to developing countries to participate in negotiations for the establishment of the ICC, its funding of NGOs from developing countries to participate in the process of establishment of the ICC, and its chairing of an important negotiating body at the Rome Conference all exemplify this point.³⁰

Canada and Nigeria were affiliated with different ideological blocs among those that emerged in the run up to the Diplomatic Conference in Rome for the adoption of the *Rome Statute*. Canada belonged to the Like-Minded Group while Nigeria belonged to the Non-Aligned Group, with the scope of powers to be granted to the Prosecutor of the ICC representing a major ideological difference between the blocs. Despite its opposition to the inclusion of *proprio motu* powers of investigation to the Prosecutor under the Statute, Nigeria voted to adopt the Statute. Canada, on the other hand, not only ratified the *Rome Statute*, but also became the first country in the world to adopt comprehensive legislation implementing the Statute.³¹ Canada has also funded two Canadian organizations ((a)the International Centre

²⁸ Canada ratified the Statute on July 7th, 2000 while Nigeria ratified on September 27th, 2001. International Criminal Court, *States Parties – Chronological List: UN Treaty – Rome Statute of the International Criminal Court*, online: <asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/states%20parties%20_%20chronological%20list.aspx>.

²⁹ 1998 *Rome Statute of the International Criminal Court*, 11 July 1998, 2187 UNTS 90 art 27 (entered into force 1 July 2002) [*Rome Statute*].

³⁰ Government of Canada, Global Affairs Canada, *Canada and the International Criminal Court*, online: <www.international.gc.ca/court-cour/index.aspx?lang=eng>.

³¹ *Ibid.*

for Criminal Law Reform and Criminal Justice Policy, and (b) Rights and Democracy) to produce manuals to assist states in drafting their national implementation legislation.³² The annual financial statements of the Court show Canada to be its sixth largest financial contributor globally while Nigeria is its second largest African contributor.³³ Canada's commitment to the regime of accountability for certain human rights violations established under the ICC was therefore not limited to the establishment of the Court – it extended to lobbying for the ratification and national implementation of the *Rome Statute*.

Canada went so far as to refuse to sign a bilateral immunity agreement with the United States of America, which would have had the effect of curtailing Canada's obligations to the ICC by preventing the surrender of Americans to the ICC. Although the *Rome Statute* does not allow state officials to enjoy immunity for crimes within its jurisdiction, the Statute recognizes that the cooperation of state parties to the Rome Statute in surrendering some state officials may sometimes be predicated upon the ability of the ICC to secure the cooperation of a third state from which the affected state official hails for the waiver of that person's international law immunities. Thus, by Article 98 of its Statute,³⁴ the ICC may not make a request for arrest or surrender where to do so would result in state parties violating their international obligations regarding the international immunities of officials from third states. On its part, Nigeria signed the bilateral immunity agreement with the United States to prevent the surrender of US citizens to the ICC.

In June 2005, the Prosecutor of the ICC announced the decision to open investigations into the situation in Darfur, stating that the investigation would focus on individuals who bear

³² Izevbuwa Kehinde Ikhimiukor, "A Review of Canadian-Nigerian Engagements in the Area of International Criminal Justice (1999-2011)" (Article delivered at the Second Osgoode/NIALS/CENSOJ Partnership Development Program Workshop on Canadian-Nigerian Human Rights Engagements: A Critical Assessment, 1 June 2015), online: < nathanson.osgoode.yorku.ca/wp-content/uploads/2013/11/Izevbuwa.Article25.05.2015.pdf >.

³³ In 2015, Canada contributed 5,906,274 Euros and Nigeria contributed 180,375 Euros. See *Financial Statements for the International Criminal Court for the Year Ended 31 December 2015*, ICC-ASP/15/12, 15th Sess. (2016) at Schedule 1: Status of Contributions as at 31 December 2015.

³⁴ *Rome Statute*, *supra* note 29.

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the greatest criminal responsibility for the crimes committed in the region.³⁵ In July 2008, the Prosecutor applied to the Pre-Trial Chamber of the ICC for an arrest warrant to be issued against Omar Hassan Ahmad Al-Bashir, the President of Sudan, for crimes against humanity and war crimes in Darfur from March 2003 to July 2008.³⁶ On 12 July 2010, the Pre-Trial Chamber decided to issue another warrant of arrest against Al-Bashir for charges of genocide.³⁷ The Chamber also directed the Registrar of the Court to prepare a supplementary request for co-operation seeking the arrest and surrender of Al-Bashir for charges contained in both warrants of arrests from all state parties and all Security Council members who are not state parties to the *Rome Statute*. On 15 July 2013, the ICC was notified of Al-Bashir's presence in Nigeria to participate in a summit of the African Union.³⁸ The Pre-Trial Chamber requested his immediate arrest and surrender by Nigeria. Following the filing of an application seeking his arrest by the Nigerian Coalition for the ICC, and calls for his arrest while in Nigeria, Al-Bashir left Nigeria and the warrant for his arrest was not executed, although there was little or no indication that Nigeria was inclined towards its execution anyway.

Currently, Nigeria is under examination by the Office of the Prosecutor (OTP). The OTP has identified eight potential cases involving the commission of crimes against humanity and war crimes. Six of the cases involve a terrorist group known as Boko Haram

³⁵ International Criminal Court, "The Prosecutor of the ICC opens investigation in Darfur" ICC (6 June 2005), online: ICC-OTP-0606-104 www.icc-cpi.int/pages/item.aspx?name=the+prosecutor+of+the+icc+opens+investigation ICC-OTP-0606-104 <www.i+in+darfur>.

³⁶ Where the court rejected the grounds of genocide in the arrest warrant application, see *The Prosecutor v Omar Hassan Ahmad Al-Bashir*, "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al-Bashir" Public Redacted Version, No: ICC-02/05-01/09, online: <www.icc-cpi.int/iccdocs/doc/doc639096.pdf>. For the warrant of arrest, see *The Prosecutor v. Omar Hassan Ahmad Al-Bashir*, "Warrant of Arrest of Omar Hassan Ahmad Al-Bashir" Public Document, No: ICC-02-05-01/09, online: <www.icc-cpi.int/iccdocs/doc/doc639078.pdf>.

³⁷ *Rome Statute*, *supra* note 29, art 6(a).

³⁸ *The Prosecutor v Omar Hassan Ahmad Al Bashir*, (2013) ICC-02/05-01/09, online: <www.icc-cpi.int/CourtRecords/CR2013_04947.PDF>.

and two involve Nigerian Security Forces for their activities in the extreme North-Eastern part of Nigeria.³⁹

B. NIGERIA AND THE TRIAL OF CHARLES TAYLOR

For its own part, Nigeria's involvement in accountability efforts for human right violations goes beyond the ICC regime. In June 2000, the President of Sierra Leone requested assistance from the United Nations (UN) to bring to justice those responsible for crimes against the people of Sierra Leone.⁴⁰ The Government of Sierra Leone requested that the UN establish an international court to prosecute those responsible for war crimes committed in the course of the civil war.⁴¹ The Security Council, on August 14th, 2000, adopted Resolution 1315 requesting the Secretary-General to negotiate an agreement with the Government of Sierra Leone for the establishment of an independent criminal court in response to the crimes.⁴² The Council, in its recommendation for the establishment of the SCSL, proposed that the personal jurisdiction of the Court should extend to "leaders" and others who bear the greatest responsibility for the commission of crimes against humanity, war crimes, and other serious violations of international humanitarian law, as well as crimes committed in Sierra Leone under Sierra Leonean law.⁴³

The Secretary-General recommended the establishment of the SCSL by an agreement between the Government of Sierra Leone and the UN, which would constitute "a treaty-based

³⁹International Criminal Court, Office of the Prosecutor, *Report on Preliminary Examination Activities (2015)* at paras 195-215, online: <www.icc-cpi.int/iccdocs/otp/OTP-PE-rep-2015-Eng.pdf>.

⁴⁰UNSC, *Letter dated 9 August 2000 from the Permanent Representative of Sierra Leone to the United Nations addressed to the President of the Security Council*, UN Doc S/2000/786, August 2000 at Annex.

⁴¹ For background, see International Center for Transitional Justice, *The Special Court for Sierra Leone Under Scrutiny*, by Tom Perriello & Marieke Wierda, (New York, NY: ICTJ, 2006); James L Miglin, "From Immunity to Impunity: Charles Taylor and the Special Court for Sierra Leone" (2007) 16 Dal J Leg Stud 21.

⁴²*Security Council Resolution 1315 (2000) on Establishment of a Special Court for Sierra Leone*, GA Res 1315(2000), UNESCOR,2000, UN Doc S/RES/1315 [*Resolution on Special Court for Sierra Leone*]; see Michael Scharf, "The Special Court for Sierra Leone" 5:14 (2000) Am Soc Intl L Insights, online: <www.asil.org/insights/volume/5/issue/14/special-court-sierra-leone>.

⁴³*Resolution on Special Court for Sierra Leone*, *ibid.* at para 3.

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sui generis court of mixed jurisdiction and composition.”⁴⁴ The SCSL was created following the conclusion of the “Agreement on the Establishment of a Special Court for Sierra Leone between the UN and the Government of Sierra Leone.”⁴⁵

Like the *Rome Statute*, the Statute of the SCSL makes irrelevant the immunity of state officials to the question of criminal responsibility or mitigation of punishment.⁴⁶ In March 2003, the SCSL issued a 17-count indictment against Charles Taylor while he was still President of Liberia, for crimes against humanity and grave breaches of the Geneva Conventions, and subsequently issued an international arrest warrant against him.⁴⁷ In August 2003, Taylor stepped down as Head of State and was granted exile by the Government of Nigeria. However, following mounting international political pressure and a request for the surrender of Mr. Taylor by the Government of Liberia, Nigeria released Taylor to Liberia to stand trial, even in the absence of a bilateral extradition agreement. He was arrested by the United Nations Mission in Liberia (UNMIL) and was transferred to the SCSL in November 2006. Taylor was subsequently convicted for war crimes and crimes against humanity and is currently serving out a fifty-year sentence.⁴⁸ Taylor became the first Head of State to be convicted by an international tribunal since the trials of German state officials for war crimes committed during World War II by the International Military Tribunal at Nuremberg. Thus, my preliminary work has not yet unearthed any direct Canadian-Nigerian engagement on this issue, although this is likely to have occurred, at least behind the scenes.

⁴⁴UNSC, *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, 2000, UNDocS/2000/915 at para 9.

⁴⁵UNSC, *Letter dated 6 March 2002 from the Secretary-General addressed to the President of the Security Council* UN Doc S/2002/246, March 2002, at Appendix II.

⁴⁶*Statute of the Special Court of Sierra Leone*, art 6(2), online: <www.rscsl.org/Documents/scsl-statute.pdf>.

⁴⁷*Prosecutor v Charles Ghankay Taylor*, (2003) SCSL-03-01, online: <www.rscsl.org/Documents/Decisions/Taylor/Appeal/1389/SCSL-03-01-A-1389.pdf>.

⁴⁸*Prosecutor v Charles Ghankay Taylor*, (2007) SCSL-03-1-T, online: <www.rscsl.org/Documents/Decisions/Taylor/392/SCSL-03-01-T-392.pdf>.

C. NIGERIA AND THE ESTABLISHMENT OF THE EAC IN THE COURTS OF SENEGAL

Nigeria was also instrumental in developing an “African option” to the non-African international trial of Hissène Habré, the former Head of State of Chad, famously dubbed as “Africa’s Pinochet.” After Habré was deposed as the President of the Republic of Chad in 1990 and went into exile in Senegal, an indictment was issued against him in February 2000 based on allegations of acts of torture committed in Chad. As a result, he was placed under house arrest in Senegal. Habré appealed against the indictment, on the ground that the courts in Senegal had no jurisdiction over the alleged acts since the acts had been committed against foreigners abroad.⁴⁹

The Court of Appeal in Dakar quashed the indictment on the basis of want of jurisdiction. The Court of Appeal held that there was no provision in Senegalese law for the punishment of crimes against humanity and that although the Criminal Code of Senegal had been amended in line with the Convention against Torture, it did not suffice to find jurisdiction over the matter as the procedural laws of Senegal under the Code of Criminal Procedure must first be amended in line with the substantive law so as to provide for universal jurisdiction for the act of torture.⁵⁰

The complainants appealed the decision to the Court of Cassation, but the appeal was dismissed.⁵¹ The Court of Cassation held that Article 5(2) of the Convention against Torture required parties to take necessary measures to establish jurisdiction over acts of torture and that the enforcement of the Convention required parties to take legislative measures. Therefore, the presence of the accused person in Senegal was not enough to base the exercise of jurisdiction in the absence of any domestic procedural legislation empowering Senegal to exercise jurisdiction.

⁴⁹*Public Prosecutor v Hissène Habré*, Cour d’Appel, Case No. 135 of 4 July 2000, 125 *ILR* 569.

⁵⁰*Ibid.*

⁵¹[Court of Cassation] 20 March 2001, *Souleymane Guengueng et al v Hissène Habré* (2002) AHRLR 183 (Senegal).

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In September 2005, a Belgian court issued an international arrest warrant against Habré and sought his extradition from Senegal.⁵² Despite Habré's re-arrest in November 2005, the Indicting Chamber of the Court of Appeals in Dakar decided that it had no jurisdiction to enforce extradition request against a former Head of state. The Senegalese President referred the matter to the African Union (AU).

At a Summit in Khartoum, Sudan in January 2006, the AU Heads of State and government established a Committee of Eminent African Jurists to consider the aspects and implications of the case against Habré and options for his trial.⁵³ At a meeting attended by 7 notable jurists, including Professor Michael Ayodele Ajomo of Nigeria, the Committee concluded that Habré was not entitled to immunity and decided on an "African option" as the solution.⁵⁴ Under this option, Senegal, Chad, or any AU member could exercise jurisdiction over the accused person or an *ad hoc* tribunal could be established in any member state to try the accused. Based on the recommendations of the Committee of Eminent African Jurists, the AU decided that the matter fell within the competence of the Union and mandated Senegal to prosecute and ensure the trial of Habré.⁵⁵ The AU and Senegal entered into an agreement establishing the EAC as an *ad hoc* chamber within the courts of Senegal to try those most responsible for the crimes committed in Chad between 1982 and 1990 under Habré's presidency.⁵⁶ Habré was charged with crimes against humanity, war crimes, and torture. On 30 May 2016, he was found guilty and sentenced to life imprisonment.

Nigeria's involvement in this area of accountability of state officials for human rights violations on the African continent is made more obvious by the fact that it is one of the

⁵² See *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, 2012 ICJ Rep 422.

⁵³ Assembly of the African Union, *Decision on the Hissène Habré Case and the African Union*, Assembly/AU/8 (VI) Add.9, 24 January 2006, Assembly/AU/Dec.103 (VI).

⁵⁴ Assembly of the African Union, *Report of the Committee of Eminent African Jurists on the Case of Hissène Habré*, Assembly/AU/Dec103 (VI), online: <www.peacepalacelibrary.nl/ebooks/files/habreCEJA_Repor0506.pdf>.

⁵⁵ *Decision on the Hissène Habré Case and the African Union*, Assembly/AU/Dec 127 (VII).

⁵⁶ Agreement on the Establishment of the Extraordinary African Chamber within the Senegalese Judicial System between the Government of the Republic of Senegal and the African Union and Statute of the Chambers, (2013) 52 ILM 1024.

biggest financial contributors to the AU. As in the cases of the ICC and the Sierra Leone Tribunal, our preliminary research has thus not yet indicated that any Canadian/Nigerian engagement occurred in regard to the establishment and operation of the EAC within the courts of Senegal.

V. TOWARDS A RESEARCH AGENDA

The research thus far has not yet revealed any direct or conscious engagement between Canada and Nigeria either in the area of immunity of state officials for human rights violations or in the course of negotiations in international conferences leading up to the establishment of the ICC. Additionally, it has not shown any direct engagement between Canada and Nigeria in relation to the work of either the Sierra Leone Tribunal or the EAC within the courts of Senegal. This is not to say, however, that such engagements have not occurred at all. Further research may yet reveal the presence of a measure of such engagements, albeit not as visibly as might be desired.

Thus, on the one hand, the main problem of Canadian-Nigerian human rights engagements in this specific area is an absence of a significant level of easily *visible* engagement. If indeed there has not been a significant level of direct engagements in this area between Canada and Nigeria, it goes without saying that there would be no attainments to be considered.

On the other hand, this problem of the absence or paucity of significant engagement in this area portends either the possibility of such engagement occurring in the future, or the prospect of such engagement being revealed by further research. The need for such engagement comes at an important time, with negotiations and debates surrounding the drafting of articles on the immunity of state officials from foreign criminal jurisdiction taking place at the ILC. Despite the topic being added to the ILC's agenda in 2007 by the United

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Nations General Assembly's Sixth Committee, this topic remains controversial, even after two Special Rapporteurs and eight reports. With the efforts of the ILC in formulating principles of immunity of state officials and the Sixth Committee debating the scope and application of universal jurisdiction, the conduct and views of states on the question is necessarily implicated. Engagement between Canada and Nigeria on this question, as important stakeholders and participants, would contribute to developing the relevant aspects of international law.

A Canadian-Nigerian Bi-National Commission was created in 2012 to facilitate bilateral exchanges between the two countries on politics, trade, development, and security issues. Currently, Canada is assisting Nigeria for capacity building counter terrorism and the provision of regional technical assistance by strengthening, *inter alia*, its criminal justice systems.⁵⁷ The establishment of this Bi-National Commission, as well as the investigation of some Nigerian security forces regarding their alleged killing of civilians in their fight against the Boko Haram insurgents, strengthens the case for increasing direct engagements between the two countries with respect to the immunities of state officials for human rights violations.

VI. CONCLUSION

The article set out to critically assess – on a preliminary basis – the literature on the issue of immunities of state officials for human rights violations, as well the available evidence (if any) on Canadian-Nigerian human rights engagements in this area. It sought to do the latter with a view to ascertaining the nature of any such engagements, as well as its attainments, problems, and prospects. My preliminary findings do not support any evidence of engagement between both countries in this area. Contemporary developments in the area of study, however, show that some opportunities for such engagement do exist.

⁵⁷ Government of Canada, High Commission of Canada in Nigeria, *Canada-Nigeria Relations*, online: <www.canadainternational.gc.ca/nigeria/bilateral_relations_bilaterales/canada_nigeria.aspx?lang=eng>.

Thus, a possible research agenda for the near future could include the identification of ways in which Canada and Nigeria can partner in the area of immunities of state officials for human rights violations including a consideration of what the nature, process, problems and prospects of such partnership might constitute. This would help inform policy and practice in this and other relevant areas across the global North-South divide. Importantly, the ways in which such partnership would impact on the criminal justice systems of both countries, as well as internationally, would be a key component in the research.